APPEAL NO. 022129
FILED OCTOBER 3, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 2, 2002. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to lifetime income benefits (LIBs) and that the claimant is entitled to reimbursement for travel expenses to obtain treatment from Dr. M for his left knee condition. In his appeal, the claimant asserts error in the determination that he is not entitled to LIBs. In its response, the respondent (carrier) urges affirmance. The carrier did not appeal the determination that the claimant is entitled to travel expense reimbursement for treatment from Dr. M and that determination has, therefore, become final. Section 410.169.

DECISION

Affirmed.

The claimant's theory of recovery, both at the hearing and on appeal, is that he is entitled to LIBs under the "total loss of use" provision of Section 408.161(a)(2). In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes; took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468; and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body, or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member, the test set forth in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). *See also* Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994. We have noted that the Seabolt test is disjunctive and that a claimant need only satisfy one prong of the test in order to establish entitlement to LIBs. *See* Appeal No. 941065.

The hearing officer's consideration of the "total loss of use" issue is reflected in Findings of Fact Nos. 2 and 5. The question of whether a claimant has suffered a total loss of use of a member is generally a question of fact for the hearing officer to resolve. *See* Appeal No. 941065. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence and to determine what facts the evidence has established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company

of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was not persuaded that the claimant sustained his burden of proving he was entitled to LIBs under either prong of Seabolt. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse the challenged determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

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Elaine M. Chaney
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Robert W. Potts
Appeals Judge